IN THE

Supreme Court of the United States

October Term, 1974

No. 74-248

UNITED STATES GYPSUM COMPANY,
Petitioner,

vs.

UNITED STEELWORKERS OF AMERICA, AFL-CIO,
Respondent.

On Petition for Writ of Certiorari
to the United States Court of Appeals
for the Fifth Circuit

BRIEF IN OPPOSITION

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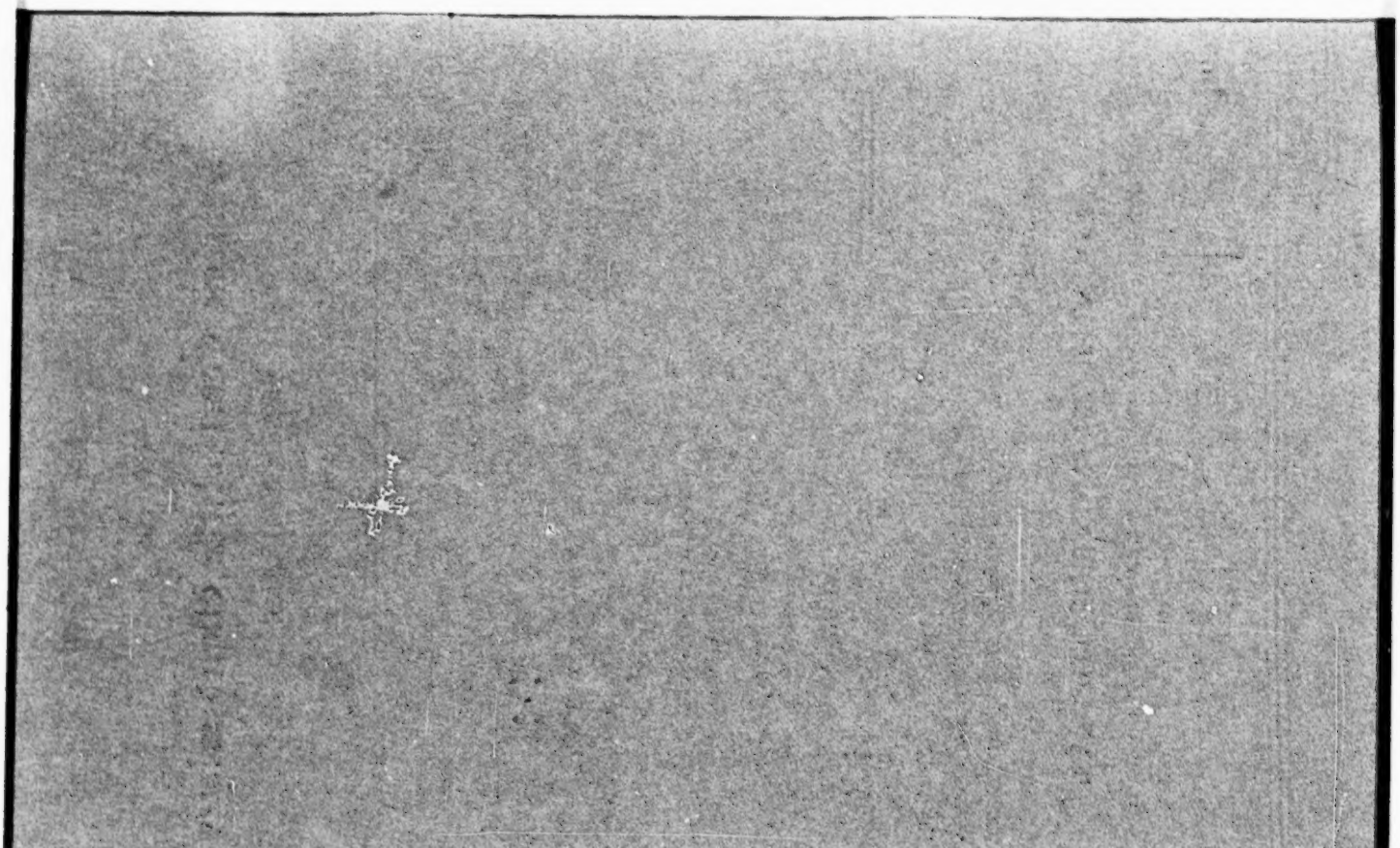

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BRIEF IN OPPOSITION

Respondent, United Steelworkers of America, AFL-CIO (the Union), believes that the opinion and judgment below are clearly correct and that review by this Court is not warranted.

COUNTER-STATMENT OF THE CASE

Petitioner (the Company) purchased the plant in question on April 1, 1965. At that time a collective bargaining agreement was in effect between the Union and the selling company which was not due to expire until March, 1967. That agreement contained, *inter alia,* a provision for the arbitration of grievances, a checkoff clause, and a provision

for a wage reopener in 1966. After purchasing virtually all of the assets and properties of the seller, the Company hired all but three of the seller's employees and continued operating the plant with the "same work force, same plant, same process, same product (except for trade name), under the same supervisors." (Appendix, A3).

Although the Company had sought to avoid assuming the collective bargaining agreement when it purchased the plant, the purchase occurred less than a year after this Court's decision in *John Wiley & Sons* v. *Livingston,* 376 U.S. 543 (1964), holding that a company purchasing a plant and continuing the operations virtually unchanged is bound to arbitrate grievances arising under its predecessor's collective bargaining agreement.

Immediately after purchasing the plant, the Company declared that it did not regard itself bound by the collective bargaining agreement, and proceeded to take actions which the Union believed to be in violation of that agreement. Accordingly, the Union filed a number of grievances under the agreement. When the Company refused to arbitrate those grievances, the Union brought an action under Section 301 of the LMRA to enforce arbitration. The district court ordered arbitration on the basis of *Wiley,* and the Court of Appeals affirmed, 384 F.2d 38 (5th Cir. 1967). The Company sought review from this Court, urging that *Wiley* should be overruled. This Court denied certiorari, 389 U.S. 1042 (1968).

The grievances were arbitrated before one of the leading arbitrators in the United States (A2 n.2), who rendered a 116 page opinion and award. He ruled that the Company was bound by the reopener and checkoff provisions of its predecessor's agreement, and that it violated those provisions by refusing to negotiate when the Union served a reopening notice, and by refusing to check off Union dues. The arbitrator concluded that it would be inappropriate to order belated negotiations pursuant to the reopener; five years had

passed, and the Union had been decertified in the interim. Instead, the arbitrator decided that the appropriate remedy for the Company's refusal to negotiate was to make the employees whole for the wage increase which they could reasonably have been expected to obtain had the Company not refused to negotiate. To remedy the breach of the checkoff clause, the arbitrator directed the Company to pay to the Union the dues which it would have received up to the date of its decertification. The arbitrator further ruled that the Company could not recapture these dues from the employees, as its refusal to honor the agreement or deal with the Union had deprived the employees of the representational services to which they were entitled.[1]

The Union instituted this lawsuit to enforce the arbitrator's award, and the court below, in a careful and well-reasoned opinion (A1-A39), upheld the award in its entirety.

ARGUMENT

As we show below, the Company has advanced no arguments warranting review by this Court.

1. The Company's principal argument is that purchasers should not be held bound by any of the provisions of their predecessors' collective bargaining agreements, even where (as here) they continue the operations unchanged and retain the seller's employees. That contention would, of course, require a reversal of *Wiley*, the very result which the Company sought unsuccessfully in its earlier petition for certiorari.

On two recent occasions, this Court has been asked to reverse *Wiley* and has declined to do so. *NLRB* v. *Burns International Security Services, Inc.*, 406 U.S. 272 (1972); *Howard Johnson Company, Inc.* v. *Detroit Local Execu-*

[1] This award was not, of course, a windfall to the Union, which had expended considerably more than the dues awarded to enforce the employees' rights under the reopener provision.

tive Board, ——U.S.——, 42 L.W. 4834 (1974). The decision below fully comports with *Wiley, Burns,* and *Howard Johnson.* As recognized in the Brief Amicus Curiae of The Chamber of Commerce (p. 3):

> "In *Howard Johnson* this Court appeared to suggest that under *John Wiley & Sons* v. *Livingston,* 376 U.S. 543 (1964), a purchaser could be compelled to arbitrate pursuant to the terms in his predecessor's labor contract if he retained virtually intact the represented employees of his predecessor. The practical effect of *Wiley* is to impose in whole or in part the terms of a seller's labor contract upon a non-consenting buyer—just as occurred in the instant case."

Neither the Company nor Amicus has advanced any considerations which were not before this Court at the time of its recent *Howard Johnson* decision and, accordingly, there is no reason why this Court should again review this issue.

2. The Company argues that the arbitrator's "make whole" remedy for its refusal to negotiate is inconsistent with this Court's decision in *H. K. Porter Co.* v. *NLRB,* 397 U.S. 99 (1970). That contention was fully considered by the court below, which found it to be without merit (A27-A30). We believe the reasoning of the court below to be wholly persuasive. In any event, even if the question were more difficult than it appears to us, it is not one warranting review by this Court. To our knowledge, this is the first case in which an arbitrator has ever fashioned a "make whole" award containing the features challenged by the Company, and the unique circumstances which made that award appropriate (an employer's outright refusal to negotiate pursuant to the terms of a contractual reopener provision) are unlikely to recur very often, if ever, in the future.

3. The Company and Amicus both contend that the arbitrator's remedy for the checkoff violations exceeded his authority. The Company's arguments were rejected by the

court below for reasons which seem to us entirely valid (A34-A36). The somewhat different argument advanced on this point by Amicus was never presented to the court below and, in any event, appears frivolous on its face.

CONCLUSION

For the reasons set forth above, the petition for writ of certiorari should be denied.

Respectfully submitted,

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